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January 25, 1994

VIA HAND DELIVERY

William Kennard, General Counsel
Office of the General Counsel
Federal Communications Commission
Room 614
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation
(two copies filed with Secretary's Office)
Implementation of Sections 3(n) and 332
of the Communications Act, **General Docket No. 93-252**

Dear Bill:

The purpose of this letter is to summarize the points made in the meeting which Steve Muir, President of ComTech Mobile Telephone Company, Peter Casciato, counsel for the California Cellular Resellers Association, Inc., and I had with you on January 18, 1994. I apologize for the delay in getting this to you. Unfortunately, the weather and the Mayor's edict intervened.

Definition of "Commercial Mobile Service"

The Commission's Report and Order should explicitly state that the term "commercial mobile service" as defined in Section 332(d)(1) includes cellular resellers. Although the statute does not expressly mention the term "reseller," the Commission has already concluded that "provision of commercial mobile service to end users by earth station licenses or providers who resell space segment capacity would be treated as common carrier service." NPRM at ¶43 (emphasis added). There can be no doubt that the term "commercial mobile service" was intended to include cellular resellers as well.

To begin with, nothing in the statutory definition of "commercial mobile service" in Section 332(d)(1) requires the provider to have a license or other authorization from the Commission. Nor does the statutory definition require the commercial mobile service provider to have its own facilities. Rather, the term merely requires the provider to make "interconnected service" available to the public on a "for profit" basis. That definition clearly encompasses cellular resellers, who provide interconnected service to their subscribers for profit.

The inclusion of resellers in the statutory definition of commercial mobile service providers is confirmed by the statutory definition of "private mobile service" in Section 332(d)(3). That latter term is defined as "any mobile service (as defined in Section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission." As the Commission correctly explained in its Notice of Proposed Rulemaking, the "linchpin" of the functional equivalency test is the customer's perception, and there is no basis upon which the Commission could conclude that a cellular reseller's customer recognizes any difference in service received from a cellular reseller than that provided by a FCC-licensed cellular carrier. Indeed, the concept of "resale" -- whether for long distance service or cellular service -- necessarily conveys the conclusion that the service is basically the same.

The legislative history of Section 332(d) reinforces the conclusion that cellular resellers are included in the definition of "commercial mobile service providers." The discussion of regulatory parity occurred in the context of Congress' understanding that some States like California actively regulate the rates of all providers of cellular service, including cellular resellers. Members of Congress therefore understood that, in deciding whether State regulation could continue, both the States and the FCC would be forced to take into account competition provided by cellular resellers, PCS, Nextel, and other mobile service providers. Indeed, in a discussion on regulatory parity at the mark-up session before the Senate Commerce Committee on May 25, 1993, Senator Stevens stated that "the issue out there is really reselling, rather than regulation." (Unfortunately, the committee staff would not allow copies to be made of the transcript, but it is available for inspection by the Commission staff.)

Attached to this letter is the statement of Representative Edward J. Markey, Chairman of the House Subcommittee on

Telecommunications and Finance, at the mark-up of the Licensing Improvement Act of 1993 in the House Committee on Energy and Commerce on May 11, 1993. Representative Markey observed that the legislation "proposes that any person providing commercial mobile service, which is broadly defined to include PCS, and enhanced special mobile radio services ("ESMRs"), and cellular-like services, should all be treated similarly, with the duties, obligations, and benefits of common carrier status." (Emphasis added.) Representative Markey added that the legislation did not "disturb the principle that carriers can be obligated to offer services to resellers at wholesale prices" or "the authority of the FCC to act on behalf of cellular resellers. . ." In fact, Mr. Markey observed that the legislation "extends resale requirements to PCS and ESMRs, thereby opening up market opportunities which do not exist today for resellers."

Mr. Markey's comments were echoed by Senator Inouye, Chairman of the Senate Subcommittee on Communications, in his floor statement on June 24, 1993, a copy of which is also annexed to this letter. In that statement, Senator Inouye stated that "all commercial mobile services would be treated as common carriers." He added, however, that the term "commercial mobile services" would not include "providers of specialized mobile radio service that do not compete with cellular service. . ." The implication of Senator Inouye's comment is that the term "commercial mobile service provider" would include parties -- like cellular resellers -- who do compete in the provision of cellular service.

Finally, there is nothing in the legislative history to indicate that Congress intended to exclude cellular resellers from the definition of commercial mobile service providers. The absence of any such indication is noteworthy since the legislative history demonstrates that Congress was very much aware of the cellular resellers' existence.

Right of Interconnection

As providers of commercial mobile service, cellular resellers are entitled to interconnection with the facilities of other carriers (including FCC-licensed cellular carriers), and that right should be explicitly recognized in the Commission's Report and Order. The right of cellular resellers to interconnection is not dependent on the new statutory provisions in the Omnibus Budget Reconciliation Act of 1993. Rather, those rights of interconnection stem from Section 201 of the Communications Act of 1934 and prior FCC decisions. Section 201(a) requires "every common carrier engaged in interstate or

foreign communication by wire or radio. . . to establish physical connections with other carriers. . ." Nothing in Section 201(a) confines that duty to common carriers with a license or other individual authorization from the FCC. Such a requirement would be antithetical to the very purpose to be served by resellers. The Commission authorized resale in the hope and expectation that resale would promote competition. See Cellular Resale Policies, 6 FCC Rcd 1719, 1730 n.67 (1991). That purpose would be undermined if a carrier's rights and obligations under Title II were dependent on an individual authorization.

The need for explicit interconnection rights for resellers cannot be underestimated. In the absence of explicit recognition of that right, further litigation over the issue will be inevitable. The current proceedings before the California Public Utility Commission are of particular concern to cellular resellers. The California PUC (1) authorized the establishment of procedures "for [cellular] resellers that want to provide their own switches" and (2) concluded that "[c]ellular resellers should be allowed to acquire interconnected NXX codes on the same basis as the facilities-based carriers." Regulation of Cellular Radiotelephone Utilities, Decision 92-10-026 (Oct. 6, 1992) at 59. Those conclusions were not disturbed on reconsideration. See Regulation of Cellular Radiotelephone Utilities, Decision 93-05-069 (May 19, 1993) at 13. In the absence of an explicit right of interconnection in the Commission's Report and Order, the FCC-licensed cellular carriers are likely to argue to the California PUC that the FCC's failure to recognize a right supersedes any interconnection authorized by the California PUC (or other State body).

Preemption of State Interconnection Order

The Notice of Proposed Rulemaking proposed to preempt all State regulation of the right to intrastate interconnection and the right to specify the type of interconnection because such regulation would allegedly "negate the important federal purpose of ensuring interconnection to the interstate network." NPRM at ¶71. The Notice of Proposed Rulemaking did not provide any detail to support that broad claim, and, in the absence of a broad federal right of interconnection for all parties (including cellular resellers), the Commission's proposed preemption cannot withstand judicial scrutiny.

The courts have made it clear that the FCC can preempt State regulation only "when the State's exercise of [its] authority negates the exercise by the FCC of its own lawful authority over interstate communication." National Association of Regulatory

Utility Commissioners v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989) (FCC's preemption of State regulation of inside wiring reversed where Commission failed to satisfy its burden that State regulation would "necessarily thwart" FCC objectives). To be sure, State regulation of interconnection which is more restrictive than FCC policy can satisfy the Commission's burden and probably should be preempted. E.g. Public Utility Commission of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989) (FCC properly preempted State order which prevented a local telephone company from allowing interconnection to customer with FCC-licensed microwave communications network). But the Commission can invoke that power of preemption only where the public detriment outweighs a private benefit. Hush-A-Phone Corp. v. United States, 238 F.2d 266, 269 (D.C. Cir. 1956).

The foregoing principles -- which are well-settled -- have particular relevance to cellular resellers. They have secured a right of interconnection from the California PUC which is strongly opposed by the FCC-licensed cellular carriers. The Commission's proposed preemption of all State interconnection regulation would void that California order and, contrary to the Notice of Proposed Rulemaking's stated intent, thwart rather than facilitate competition.

Standard for Review of State Petitions

Paragraph 79 of the Notice of Proposed Rulemaking does little more than to repeat the broad language of Section 332(c)(3) that a State can petition the Commission to continue its rate regulation of commercial mobile service providers. However, the Notice of Proposed Rulemaking does not provide any detail concerning (1) the particular information which a State should submit to satisfy its burden or (2) the standard of review that the Commission will apply in determining whether a State has satisfied its burden.

The foregoing issues are ones that will necessarily have to be resolved in the context of any petition filed by a State. It will be more efficient for all concerned -- including the Commission, the States, and interested parties -- to specify those parameters in the course of the rulemaking rather in the course of adjudicating a particular State petition. In clarifying its intent, the Commission should make it clear that it will apply the same standard of reasonableness to any showing by a State that courts apply in their review of FCC decisions. The Commission does not have the resources to conduct a de novo hearing on matters affecting rates within a particular State. And, beyond the question of resources, a State which has expended

substantial time, effort and money to investigate the level of competition and service in a particular State should be shown some deference. Conversely, a State which has failed to expend the necessary time, effort, and money to investigate rates and service will be unable to pass muster under the Commission's standard.

It should be added that cellular resellers do not expect every State petition to favor their interests. However, the foregoing standard would be a fair one consistent with administrative practice and the public interest.

I hope that the foregoing comments are useful. If you have any further questions, please let me know.

Sincerely,

KECK, MAHIN & CATE

Attorneys for
Cellular Service, Inc.

By: _____
Lewis J. Paper

cc: David Nelson
Steven Muir
Peter Casciato, Esq.

to eliminate this practice, rather than perpetuate the charade.

Third, the administration has found a way to raid the trust funds to finance new Federal spending, without technically touching the funds. They will just confiscate benefits.

Fourth, the administration's proposal will, in effect, turn Social Security into a means-tested program—a severe breach of faith with the American people.

What most don't realize is that not only Social Security, but interest, pension, dividend, tax-exempt bond, and wage income as well, are included in the calculation of this tax. Thus, many seniors with incomes over $25,000—a figure that will have fallen to $15,000 in today's dollars by 2010, when baby boomers begin to retire—will find that they effectively get no Social Security benefits at all. In short, Government will penalize instead of reward those who have sacrificed during their working years to save money for their retirement.

The most disturbing consequence of the President's proposal is that it continues to punish those seniors who still need to work in order to make ends meet. They would be hit with both the tax on their benefits and the Social Security earnings test penalty, which forces them to forfeit $1 in benefits for every $3 in income they earn over $10,560—a combined marginal tax rate that approaches 100 percent for some. During the campaign, he indicated he intended to address this confiscatory policy. I am sure few thought what he really intended to do was increase the taxes on elderly workers, as this proposal would do.

It is certainly true that our Nation's seniors—as a group—are better off today than they were when Social Security was created in 1935. It is also true that many other groups in our society are suffering from declining standards of living. Deficit reduction and economic growth are proper imperatives for the new administration. But, despite their sales job to the contrary, the administration's proposal to increase the taxation of Social Security benefits is neither an appropriate nor effective way to achieve them.

THE TRANSPORTATION FUEL TAX AND THE AVIATION INDUSTRY

As anyone who has flown regularly knows, the past few years have not been particularly good ones for the airline industry. Well known nameplates such as Midway, Pan Am, Eastern, Peoples Express, Frontier, Braniff, Republic, Air Florida, and National, are no longer flying, having merged into larger carriers or gone out of business completely. With the passing of each of these carriers, this Nation's airline industry has lost tens of thousands of jobs.

More recently, USAir announced that it expected to show another substantial loss in 1993, and Northwest Airlines states that it will be forced to file for bankruptcy protection within the next few weeks. And testimony before the recently constituted National Commission to Ensure a Strong and Competitive Airline Industry indicated that the industry has lost $10 billion since 1990.

While structural problems, foreign competition, and extremely high wage rates account for part of the airlines' difficulties, the biggest problem has been dealing with the enormous tax burden placed upon the industry. I'm not referring to just the 34 percent—soon to be 34 or 36 percent—corporate tax rate, or property taxes and user fees, paid by all businesses.

As a matter of fact, last year, the airline industry and airline passengers paid a total of $29 billion in Federal passenger related taxes. A list of some of those taxes includes a 10% domestic ticket tax of $4.5 billion, an airport passenger facility charge of $11.3 billion, payroll taxes of $1.5 billion, a $6 international departure tax, and the list goes on and on.

It is small wonder, then, that the airline industry has been suffering. What is surprising, and deeply disturbing, is that the budget reconciliation bill will greatly exacerbate the airlines problems by imposing a new 4.3 cents per gallon tax on transportation fuels to replace President Clinton's broad-based energy tax.

This would add more than $500 million annually to the operating costs of an already financially decimated industry. To make matters worse, the House-passed tax bill would add another $850 million to the airlines annual operating deficit.

This is irrational and irresponsible public policy and will undoubtedly result in additional airline failures, less competition, higher fares, and, most importantly, additional job losses. One industry estimate projects that the airlines will lose 4.7 million passengers per year, slow the industry's fiscal recovery, and cost 26,500 jobs.

What is particularly tragic is that this additional burden is being imposed on the airline industry to support substantial new Government spending. Proponents of the industry have said they want to do all they can to help the airlines, but with friends like this, the industry certainly doesn't need to worry about its enemies.

I had the pleasure of serving as the ranking Republican on the Aviation Subcommittee in the Senate for 4 years, and had the opportunity to study, discuss, and hear testimony from many well-qualified experts and representatives in the airline industry. More recently, I testified before the National Airline Commission on some of the problems confronting the aviation industry. I also was able to hear and read the testimony of other witnesses before the commission. Every domestic airline executive who spoke to the Commission said the industry is over burdened by taxes and fees that are difficult to pass on to consumers.

The answer for the airline industry is for fewer taxes, not more. A new tax on transportation fuels is misguided. Only by helping our Nation's air carriers improve their fiscal health can we hope to maintain a competitive airline industry and create new American jobs. Unless we think we can do without domestic airlines, we should do without a transportation fuel tax.

Mr. PRESIDENT. President Clinton said he wanted to "put people first." Unfortunately, this bill puts a lot of people last; especially those in our society who, as the distinguished Senator from Texas says, pull the wagon. It hurts most those who most help this country grow, who create the jobs, and who have already given much to this country.

The Clinton economic plan and the budget reconciliation bill is bad for America. It will, at best, only marginally reduce the budget deficit in the short term, will do nothing to lower the national debt, it does not significantly cut government spending, it institutionalizes bigger Government, and it will result in fewer jobs being created and weaker economic growth.

RURAL PROGRAM IN THE COMPETITIVE BIDDING PROVISIONS

Mr. INOUYE. Mr. President, I rise to offer certain explanatory comments concerning the rural program included in the competitive bidding provisions of the reconciliation bill. The rural program ensures that rural telephone companies will be able to obtain communications licenses in those cases where the FCC uses auctions, as long as the rural telephone companies pay for the licenses. The amount that the rural telephone companies will pay will be equal to the average of the amounts paid by auction winners for similar licenses. The Congressional Budget Office [CBO] has indicated that inclusion of the rural program in this legislation does not prevent the committee from reaching its target of $7.2 billion.

The purpose of the rural program is to ensure that consumers in rural areas are able to obtain access to new technologies when competitive bidding is employed. These provisions ensure that, when the FCC uses competitive bidding to award two or more licenses for services that compete with the telephone exchange service provided by a qualified common carrier, the FCC shall reserve one license in each rural market for the telephone company serving that market. Although these provisions are almost identical to the provisions included in the substitute to S. 335 as ordered reported by the committee on May 25, 1993, a few clarifications have been made to the language concerning the valuation of rural licenses to ensure that the rural program does not result in any loss of revenue to the Federal Government.

To illustrate the operation of the rural program, consider a hypothetical example where the FCC decides to award three personal communications services [PCS] licenses per market using competitive bidding. Assume further, again for illustration only, that

the FCC elects to award all three licenses for statewide geographic service areas. For each State market, the FCC would designate three blocks of frequencies, which in this example are designated block A, block B, and block C. Since PCS will compete with terrestrial local exchange service, the FCC would designate one block, for example block C, as subject to the rural program.

The FCC would first auction statewide licenses for the block A and block B frequencies in each State. The FCC next would identify areas within the statewide market that meet the legislation's definition of rural—that is, nonurbanized areas containing no incorporated place with more than 10,000 inhabitants or areas served by small—10,000 or fewer access lines—or municipal carriers. Any otherwise eligible carrier that had already been awarded a PCS license in the block A and block B bidding would not be qualified for the rural program. The FCC then would use competitive bidding to award the license for the block C nonrural program frequencies in each State, excluding areas that remained eligible for rural program licenses.

A qualified carrier then could rely on the value set by the FCC for the rural program license for its rural service area in deciding to file an application under the rural program. There is no intention to force any rural carrier to commit itself to paying an unknown fee for its license as the price of proceeding under the rural program. However, the program is not intended to reduce the revenues obtained through the spectrum licensing authorized by this legislation.

Therefore, should any qualified common carriers fail to apply or be ineligible to apply for their rural program licenses, the FCC would award licenses for those areas by competitive bidding pursuant to section 309(j)(3)(D). The intent is to recover the same amount from the block C licenses (including rural program licenses, the nonrural licenses, and the licenses issued pursuant to subsection (j)(3)(D)) as the average of the amounts received for the block A license and the block B license.

The previous example hypothetically assumed State markets. The identical process would apply using whatever local, regional or national service area the FCC chooses.

As an additional example, if the FCC has issued three licenses per market, and the rural program license(s) are cut out of the C license, the result might be as follows. License A, which covers the entire market, is awarded via competitive bidding for $98. License B, which also covers the entire market, is awarded via competitive bidding for $102. The average license value for the licenses not subject to the rural program would be $100. License C, which does not include that geographic area served by any qualified common carrier, is awarded via competitive bidding for $80. The total value of the remaining rural program license or licenses is therefore $20. If the market contains two rural areas served by qualified common carriers, and the nonrural C license is awarded via competitive bidding for $80, the total value of both rural program licenses would be $20. The two licenses would not necessarily be valued equally at $10 each. The FCC is given the discretion to value each license individually.

Thus, the prices of each rural license may vary so long as the aggregate value of all the rural program licenses in a given market is equal to the aggregate value set through the procedure described in subsection (c)(1).

Since otherwise qualified common carriers may become ineligible for the rural program by winning a license to provide service within their local exchange area through competitive bidding, or for some reason may choose not to apply for the rural license, there is a slight possibility that there would be no qualified common carrier eligible to apply for a rural program license even if the area were to qualify as a rural area. In this instance, the FCC shall award the license for that area under section 309(j)(3)(D). I anticipate that any revenue shortfall that would otherwise be created because of the ineligibility of a common carrier serving a rural area shall be recovered through this procedure. Prices initially set for rural licenses by the FCC shall not be altered to make up for these licenses.

Finally, the provisions on competitive bidding clarify that potential revenues from competitive bidding are not to affect the FCC's decisions to allocate spectrum. The provisions further clarify that persons awarded a license through competitive bidding do not gain rights any different from the rights obtained by persons who gain licenses through methods other than through competitive bidding. The FCC has been undertaking efforts to encourage the provision of new technologies and services by entrepreneurs and innovators. Consistent with the FCC's statutory obligation and its prior efforts in that regard, the Committee included language in this subsection which states that nothing prevents the FCC from awarding licenses to companies or individuals who make significant contributions to the development of a new telecommunications service or technology. The legislation makes clear that communications licenses shall not be treated as the property of the licensee for property tax purposes or other similar tax purposes by any State or local government entity.

One additional point needs to be made clear. The legislation states that a telephone company that receives a license pursuant to the rural program shall not be eligible to receive any other license to provide the same service in such area. The intention of this provision is to bar telephone companies from holding more than one PCS license, for instance. Nothing in this provision prohibits a telephone company that holds a cellular license from participating in the rural program for the purpose of obtaining a PCS license.

REGULATORY PARITY

Section 409 is intended to ensure that providers of commercial mobile services are regulated in a similar, if not identical, fashion. These provisions are almost identical to the provisions contained in the substitute amendment to S. 335, order reported by the committee on May 25, 1993. Under the legislation, all commercial mobile services would be treated as common carriers. The term "commercial mobile services" is not intended to include all providers of land mobile services. For instance, providers of specialized mobile radio service that do not compete with cellular service are not intended to be covered under the definition of commercial mobile services. The FCC is given the authority to determine who will be included in the definition of a commercial mobile service provider. In general, the legislation would forbid States from regulating the entry of or the rates charged by these commercial mobile services providers.

At the executive session at which this committee ordered this budget reconciliation legislation to be reported, the committee agreed to an amendment offered by Senator BRYAN to give added consideration to States that currently regulate cellular service. This amendment is not contained in the substitute amendment to S. 335, ordered reported by the committee on May 25, 1993.

Under subparagraph (C), as added by the amendment, a State that has in effect, on June 1, 1993, regulation concerning the rates for any commercial mobile service may petition the FCC to continue exercising authority over such rates within 1 year after the date of enactment of this legislation. The FCC is directed to grant or deny any petition within 270 days of its submission. The FCC's review of any such petition must be fully consistent with the overall intent of section 409. It is intended that in making a determination under subparagraph (C), the FCC will examine whether a State demonstrates that, in the absence of rate or entry regulation, market conditions (including levels of competition) fail to protect subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. Under subparagraph (D), if the FCC grants a State's petition to continue regulating the rates for commercial mobile services, any interested party may, after a reasonable amount of time following the FCC decision, petition the FCC for a determination that the exercise of the State authority is no longer necessary to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory. The FCC, after opportunity for public comment, shall issue an order that grants or denies such petition within 9 months of the filing of the petition.

Finally, I understand that there is ome concern that the competitive bid-ing provisions of this legislation could ause harm to the people who have al-eady submitted lottery applications or communications licenses. As re-uired by the reconciliation instruc-ions issued to the Commerce Commit-ee by the Budget Committee, the leg-slation requires the FCC to use com-etitive bidding—except in certain cir-umstances—for all communications icenses issued after October 1, 1993. The FCC is currently in the process of onducting lotteries for several new ommunications services, and several housand applications have already een submitted to the FCC for these otteries. I understand that the appli-ants for these services, who have al-eady spent money to file these appli-ations, would be disappointed if the FCC were no longer able to conduct otteries after October 1, 1993. I am ex-loring the possibilities of helping hese current applicants as long as here is no budgetary impact. I will ontinue to examine this question once he conference convenes on this legis-ation.

Mr. President, I appreciate the oppor-tunity to present these clarifying views on some of the provisions of this legis-lation.

COMPETITIVE BIDDING PROVISIONS

Mr. GORTON. Mr. President, I rise today concerning the competitive bid-ding provisions in the Budget Rec-onciliation Act. I am a strong sup-porter of competitive bidding but want-ed to bring attention to one concern that I have about the Senate provision which I hope will be addressed in con-ference.

The Senate provision provides that competitive bidding will be held after October 1, 1993 for the assignment of new spectrum. It is vitally important that the Federal Communications Commission has sufficient flexibility to determine how to implement this new licensing scheme, especially with respect to spectrum that has already been allocated to specific tele-communications services and for which the Commission has already com-menced licensing processes. As Federal Communications Chairman James Quello said in a letter to me dated June 23, 1993:

In some services in which licenses are cur-rently awarded by lottery, the Commission has tentatively selected winning applicants, but will not be in a position to grant licenses until later this year. To change our position to grant licenses midstream for these serv-ices would greatly complicate our licensing procedures and likely give rise to legal chal-lenge.

It is my understanding that this is the case with the 220-222 MHz tentative selectees who have yet to be issued a li-cense by the FCC. There are also a number of other proceedings currently underway at the FCC that are in var-ious stages. In some cases, applications have been filed but the FCC has not with some cellular licenses. These is-sues will need to be addressed in con-ference.

Furthermore, the bill makes certain exemptions from comparative hear-ings. The conferees should also be aware that there are other services that also serve the public interest which need to be examined for possible exemption. These include multipoint distribution service applications which I understand there are over 2,000 appli-cations pending. Instructional tele-vision fixed service such as that oper-ated by the Washington State Univer-sity in Spokane and by KCTS, a public television station in Seattle. Addition-ally, the conferees should consider pri-vate operational fixed microwave serv-ice which are used for example by the Washington Higher Education Tele-communications System to serve class-rooms in Pullman, Richland, Seattle, Spokane, Vancouver, and soon, Wenatchee and Yakima.

I ask unanimous consent that the at-tached letter from Chairman Quello be included after my statement.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

FEDERAL COMMUNICATIONS COMMISSION,
Washington, DC, June 23, 1993.

Hon. SLADE GORTON,
U.S. Senate, Hart Office Building, Washington, DC.

DEAR SENATOR GORTON: I write to offer some thoughts concerning pending legisla-tion authorizing the Federal Communica-tions Commission to use a system of com-petitive bidding for spectrum allocations. First and foremost, let me emphasize that I recognize the importance and great benefits that can be derived from competitive bid-ding, and I fully support its use as a means of raising significant revenue for the U.S. Treasury. I regard competitive bidding as an efficient tool for management of this valu-able national resource, and look forward to implementing the law as ultimately adopted by the Congress.

There are, however, two potential problem areas to which I wish to draw your attention. First, it is vitally important that any com-petitive bidding legislation provide the Com-mission with sufficient flexibility in deter-mining how to implement this new licensing scheme, especially with respect to spectrum that has already been allocated to specific telecommunications services and for which the Commission has already commenced li-censing processes. Please be assured that the Commission will work to utilize competitive bidding wherever practicable. However, a sudden mandatory change to competitive bidding from existing licensing procedures could impede the development and, ulti-mately, the viability of these services. In some services in which licenses are currently awarded by lottery, the Commission has ten-tatively selected winning applicants, but will not be in a position to grant licenses until later this year. To change our licensing rules midstream for these services would greatly complicate our licensing procedures and likely give rise to legal challenges.

Indeed, requiring the Commission to use competitive bidding across the board could have unintended consequences. For example, the wireless cable industry, which may pro-vide effective competition to cable tele-vision, has developed using a complex proc-ess of acquiring multiple licenses and leasing [illegible] the licensing procedure in this service could render wireless cable prohibitively expen-sive, thereby reducing its potential as a com-petitor to cable. For these and other reasons, it is crucial that the Commission be allowed the flexibility to determine the best means of awarding licenses so as to ensure efficient use of the spectrum and encourage the devel-opment of competitive and innovative com-munications systems.

In addition, in your consideration of com-petitive bidding legislation, I would also urge you to be mindful of the potential ramifications on international telecommuni-cations service providers who utilize spec-trum in other countries as well as in the United States. For example, requiring use of competitive bidding for low earth orbiting satellite system licenses in this country might subject those licensees to exorbitant payment requirements for access to spec-trum in other countries. I am particularly concerned that some foreign governments opposed to the use of our international tele-communications accounting and auditing standards could use our competitive bidding requirement as a justification for retaliatory measures.

I greatly appreciate your attention to these concerns, and I welcome the oppor-tunity to provide any assistance you may need in considering this important legisla-tion.

Sincerely,

JAMES H. QUELLO, *Chairman.*

AMENDMENT TO RESTRAIN ENTITLEMENT GROWTH

Mr. ROCKEFELLER. Mr. President, I rise to address the amendment offered by the Senator from Tennessee con-cerning restraining the growth of enti-tlement spending. This amendment is a well-intentioned, thoughtful response to a building consensus in the Congress and in the country that we must try to slow the growth of entitlement spend-ing. And what is probably most impor-tant is what this amendment, as op-posed to many of the prior proposals that arbitrarily cap entitlement spend-ing, does not do.

This amendment does not put an ar-tificial cap on entitlement spending that would force automatic, harmful cuts in programs that serve the Na-tion's elderly, the sick, the poor, and the disabled. It tries to retain some flexibility in how we achieve cuts if Congress and the President determine they are needed. The Senator's amend-ment recognizes that we already have a cap on spending because of the pay-as-you-go requirements in the Budget En-forcement Act, and the amendment ex-tends the requirements of that act. The amendment also clearly recognizes the fact that this Budget Reconciliation bill does more to restrain entitlement spending than any bill in history—to the tune of about $100 billion. We cut $65 billion in health spending alone. It wasn't easy. I wish it hadn't been nec-essary, but the chairman of the Fi-nance Committee worked doggedly to make sure that we met the challenge. And we tried to do so as fairly and re-sponsibly as possible.

Importantly, this amendment does not totally abdicate our duty as elect-ed representatives to act responsibly to help control our health care spending while protecting the interests of the

beneficiaries of these Federal programs. It says that if cuts are needed, we will have to take a serious look at the policy considerations before we cut. A flat entitlement cap arbitrarily locks us into an automatic pilot procedure that runs the very real risk of undermining the protection that Medicare and Medicaid provide and aggravating the health cost spiral for all Americans.

This amendment does not set the caps at a level that will guarantee that deep cuts in current benefits will have to be made, regardless of our success in significantly curbing the growth of these programs. Importantly, it does not make Veterans, farmers and civil servants suffer because of the excesses in health programs.

I think we all should be honest about why we are debating this issue today. We know the real motivation behind the entitlement cap movement is to control the growth of the two fastest increasing entitlement programs—Medicare and Medicaid. And for the record, every Senator knows who these programs serve—our Nation's most vulnerable populations: the elderly, poor pregnant women and children, and the disabled. Consequently, very few Senators are willing to take them on directly. It would look too mean-spirited. Instead, a device, something seemingly innocuous called an entitlement cap, is used to achieve the same result: cuts in those programs, cuts in benefits.

I ask my colleagues not to believe the rhetoric that under any one of these garden variety entitlement cap proposals that we are just controlling growth, so any cuts would just reduce the increases in these programs. All those proposals that I have seen would result in cuts to beneficiaries—higher out of pocket costs for Medicare beneficiaries, less services for the Medicaid population. They would mean less access to health care. They would mean less care. We must not kid ourselves. That is why the chairman's proposal to constrain entitlement growth is a valuable alternative to what I consider to be callous, irresponsible approaches to this issue.

It is my judgment that the best attribute of this amendment is that it will allow us to finally get to the real solution to these underlying problems—health care reform. The entitlement cap movement is in essence a plea for what I have long been begging for—all-out health care reform with stringent cost containment. That is because across-the-board health cost controls are the only way to curb the excessive growth in health care costs.

In a recent report the Congressional Budget Office states, "* * * in the absence of other changes, further attempts to control public sector spending would probably produce additional cost-shifting to the private sector * * *" The reasons for the increase in health entitlement are simply these: First, health inflation; second, growth in the number of poor people; and third, growth in the number of disabled individuals. We can't repeal inflation. We can't control the number of disabled and poor people. The Federal Government's own health budget problems cannot be addressed in isolation—they can only be addressed as part of systemwide, comprehensive health care reform.

We can reform our health care system to address these underlying problems. We can do that this year, in this Congress. And we can give the American people something while we are doing it: a more efficient health care system that works for every American and that America can afford to sustain.

IMPACT ON CALIFORNIA

Mrs. FEINSTEIN. Mr. President I have thought long and hard about this legislation. Unquestionably, it is the most important bill we will consider this year. What we do today will have a great impact on the people of this country—people who need jobs and who desperately want to believe that this Congress and this administration can turn the economy around.

Nowhere in this country is the impact of the recession felt more strongly than in California. The unemployment rate in California stands at 8.7 percent—nearly two percentage points higher than the national unemployment rate. Today, 1.3 million Californians are out of work and throughout this country 8.8 million people today are unemployed.

Two separate economic reports released this week add to the gloomy economic conditions in California, according to a Los Angeles Times story from today that I would like to submit for the RECORD. Let me highlight just a few points:

A report by the Federal Reserve Board released Wednesday showed that California's economy continues to lag behind the rest of the country. Manufacturing is "in a serious slump," activity in the high-technology electronics industry is down, and sales remain flat.

The report says: "The majority of our respondents expect the economy to expand. Most contracts in California and Washington, however, expect their regions to under perform the national average."

A separate report, by UCLA's Business Forecasting Project, said that the three trends needed for California's rebound still have not occurred: higher housing starts, a healthier national economy, and stronger demand for California's goods and services. In fact, this report shows that 150,000 new housing units in California must be constructed just to meet demand. The current rate of construction will only bring 100,000 new units by next spring. I am pleased that low-income tax credit are extended permanently. This can provide the incentives necessary for builders and non-profits to build affordable units for families.

This Congress and this administration have a responsibility. And that responsibility is to turn this economy around.

Mr. President, I applaud Chairman SASSER, the distinguished floor manager, Chairman MOYNIHAN, and the majority leader for putting together this budget reconciliation bill. With our colleagues on the other side of the aisle content to simply play politics with the country's economy, this was no small achievement.

By decreasing taxes and cutting additional spending from the President's proposal, I believe that the Finance Committee has significantly improved the bill. The committee also achieved a better than 1 to 1 ratio of spending cuts to tax increases. This was crucial. We cannot nor should not ask the American people to sacrifice unless the Government is willing to sacrifice as well.

I am pleased the Btu tax has been eliminated—it was ill conceived, too cumbersome to implement and would have cost my State jobs we cannot afford to lose. Most importantly, by reducing the deficit by over $500 billion, this bill will help keep long-term interest rates low, an important factor in improving the economy.

I intend to vote for the bill now before us, but no one should misconstrue that vote as an indication that I will support the final bill that comes out of the conference committee unless there are significant changes in the legislation.

I am troubled by this bill because it would eliminate nearly all of the President's investment incentives.

Let me mention a few concerns I want to see addressed in the conference committee.

First, I am concerned about the Finance Committee's treatment of the research and experimentation tax credit. The President requested, and the House approved, a permanent extension of the credit. The Senate Finance Committee's bill, however, includes only a temporary 1-year extension and does not make the credit retroactive to the date of its expiration.

I was pleased to introduce a sense of the Senate today, co-sponsored by 23 Senators, that expressed the united view that R&D tax credits should be permanent.

Several chief executive officers from firms in California have written to me to express their deep concern about the Finance Committee's treatment of the credit. The normal R&D planning cycle for high technology companies spans at least 2 years. A temporary credit, particularly one that is not retroactive, will not induce new research and development nor will companies be able to hire new employees.

As you know, the goal of the R&E credit is to induce additional research and development to increase productivity and to create jobs. Substantial research shows that without proper incentives, U.S. companies, particularly small companies, will not adequately invest in research and development.

U.S. House of Representatives
Committee on Energy and Commerce

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DAVID H. MOULTON
CHIEF COUNSEL AND STAFF DIRECTOR

Statement of Rep. Edward J. Markey
Mark-up of Budget Reconciliation, Subtitle C
Licensing Improvement Act of 1993

Mr. Chairman:

The amendment I offer today marks a turning point in the licensing of communications services in our country. For the first time we are enabling the Federal Communications Commission to use auctions as a means of assigning the radio spectrum. The rationale behind this proposal is that we must reform and improve the current licensing process, which uses lotteries. In short, there has to be a better way to manage a precious federal resource than picking names out of a hat. The proposal before the Committee puts in place a better way, true to the principles underpinning the Communications Act, while at the same time raising revenue, over $7 billion, for the public.

Let me take a few minutes to explain the Amendment to the Committee Print. Section 5203 grants the FCC authority to use spectrum auctions where there are mutually exclusive applications for new licenses and where the spectrum will be used by the license holder to offer services to subscribers for compensation. This section also directs the Commission to select an auction system that promotes: 1) Rapid deployment of new technologies and services so as to benefit all the public, including those in rural areas; 2) availability of new and innovative technologies to the public; 3) recovery for the public a portion of the value of the spectrum, and 4) efficient use of the spectrum.

The bill also directs the FCC to establish rules on auctions that will help enforce many of these objectives. First, the legislation provides concrete assurances that those living in rural areas will enjoy access to advanced technologies as quickly as the rest of the country by including strict performance requirements to ensure prompt delivery of service to rural areas.

Second, the bill directs the Commission to establish alternative payment mechanisms to encourage widespread participation in the auction process. For those Members on the Committee who want to offer dreams to young struggling engineers and innovators, whether in garages in the Bayou or Boston or the backwoods of any state, these provisions give you that ability.

This specific provision makes certain that those who are rich in ideas and low on cash get a chance to enroll in the future. This provision directs the FCC to consider what alternative payment methods should be used, such as installment payments or royalty payments or some combination, so that all Americans have a chance to participate in the communications revolution.

This legislation also enables the FCC to continue to hold out the

promise of a "pioneer's preference" for the truly genius who catapult technology to another level. In fact, some of that genius is what spawned the entire PCS revolution. Under this legislation those truly genuine technology pioneers will be able to make a run for the roses and get a big payoff if they succeed. As we all know, that is a most powerful incentive, and that is why I think it is vital that we continue the overall thrust of the pioneer's preference program.

Regarding how auctions will be conducted, the proposal reflects the experience with lotteries and gives the FCC authority to make sure that bidders are qualified to build and operate a system and hold an FCC license. The bill clamps down on the churning and profiteering that has characterized the lottery system, and ensures it does not repeat itself under an auction system. I also think it is important that we insulate the FCC's procedures from budgetary concerns. There is a provision that will give the FCC a shield from those who seek to tilt communications policy in order to increase revenues.

A fundamental regulatory step that this bill takes is to preserve the core principle of common carriage as we move into a new world of services such as PCS. I have grave concerns that the temptation to put new services under the heading of private carrier is so great that both the FCC and the states would lose their ability to impose the lightest of regulations on these services. The temptation to label everything private is all the more compelling because a recent court of appeals case held the FCC has no flexibility to apply Communications Act requirements. The risk of labeling all services private is that the key principles of nondiscrimination, no alien ownership, and even minimal state regulation would be swept away. This is one area where the FCC simply lacks the authority to make a rational choice, and so the legislation addresses that issue.

The fact that this legislation ensures PCS, the next generation of communications, will be treated as a common carrier is an important win for consumers and for state regulators and for those who seek to carry those core notions of nondiscrimination and common carriage into the future.

The Amendment to the Committee Print enables the FCC to identify in a rulemaking which requirements it finds are not necessary to ensure just and reasonable rates or otherwise in the public interest. This section has been modified to further make certain that the FCC retains the authority to protect consumers and apply regulations in a sensible fashion.

In addressing this issue, however, it is necessary to take a broader view of creating parity among competing services. The legislation proposes that any person providing commercial mobile service, which is broadly defined to include PCS, and enhanced special mobile radio services (ESMRs), and cellular-like services, should all be treated similarly, with the duties, obligations, and benefits of common carrier status. The legislation also proposes that states would not be able to impose rate regulation, but this amendment makes explicit that nothing precludes a state from imposing regulations on terms and conditions of service, which includes such key issues as bundling of equipment and service and other consumer protection activities. Moreover, the intent here is not to disturb the principle that carriers can be obligated to offer services to

resellers at wholesale prices. For the vast majority of states, their ability to regulate in this area would be preserved.

In addition, the authority of the FCC to act on behalf of cellular resellers would not be affected. Significantly, this legislation extends resale requirements to PCS and ESMRs, thereby opening up market opportunities which do not exist today for resellers.

I believe these changes must be seen in the context of the whole bill. This legislation sets up a mechanism so that in the next 12 to 18 months, we will see 3, 4, 5, or 6 new providers of mobile service added to most markets. The result would be a flurry of competition by entities which all have common carriage duties. And the result would be good for consumers by delivering a breadth of new services to the public at competitive prices.

I appreciate that there is some concern that this vision of a competitive world for mobile services may not be fully realized as soon as some contend. I share this concern. That is why, working with a number of Members from the Subcommittee, we have crafted language that ensures that if the promise of competition, as I just outilined does not take hold, then a State can exercise authority to regulate rates. In particular, the bill provides that States can regulate rates if they show that competition has not developed enough to adequately protect consumers from unjust rates. Moreover, the FCC is directed to respond to any State request for authority within 9 months.

Now to turn to the last section of this part of the bill, which states that auction rules shall be issued in 210 days and PCS licenses issued in 270 days. These tight schedules are necessary to realize the revenues that are part of our reconciliation instructions and keep PCS on target.

Unlike the bill considered by the Subcommittee, this amendment contains a new chapter directing the Department of Commerce to identify 200 megahertz of spectrum to be freed up from government use and eligible for assignment by the FCC. This proposal, which is embodied in H.R. 707, sponsored by Chairman Dingell and myself, passed this Committee in February by a unanimous vote, and passed on the floor with only 5 No votes. We are proposing to include this proposal as part of budget reconciliation because that makes certain that there will be spectrum available for the FCC to auction off. Hence, the addition of this proposal makes the budget targets more likely to be met.

In conclusion, let me say that I have appreciated working with Mr. Cooper, Bryant, Boucher, Synar, Schenk, Lehman and our chairman, Mr. Dingell, along with the minority, to come up with a bill that meets some of the valid concerns raised during consideration of this proposal. I urge support for this amendment.